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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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# No. 942

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R. M. VAUGHN AND WIFE, MILLIE LOU VAUGHN,
*Petitioners,*

*vs.*

CONTINENTAL ROYALTY COMPANY.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

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BEN D. CLOWER,
FRANK BEZONI,
*Counsel for Petitioners.*

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

**Summary Statement of Matters Involved.**

There is involved in this suit title to an undivided mineral interest out of 101 acres of land in the W. N. Baker Survey in Titus County, Texas.

The suit was filed by R. M. Vaughn and his wife, Millie Lou Vaughn against the Continental Royalty Company in statutory form of trespass to try title under the Texas Statutes, and was filed in the State District Court in the County

of Titus, State of Texas, and was transferred by the Continental Royalty Company to the United States District Court for the Eastern District of Texas.

The conveyance under which the defendant, Continental Royalty Company claimed title to the undivided mineral interest in the tract is as follows:

"THE STATE OF TEXAS,
*County of Titus:*

Know All Men By These Presents: That we, G. A. McPeters and Lilie McPeters, his wife, of Titus County, Texas, for and in consideration of $6.00 per acre, to be paid by the Continental Royalty Company, as hereinafter fully set out, do hereby bargain, sell and convey unto the Continental Royalty Company, a corporation, an undivided one-half interest in and to all mineral rights, in and under the following described tract of land, subject to a certain lease hereinafter mentioned.

Lying and being situated in the County of Titus, State of Texas, being out of the W. N. Baker Survey, and more fully described as follows, to-wit:

Containing 101 acres, more or less, recorded Nov. 16th, A. D. 1917, Book 36, page 434. Being out of the M. E. P. and P. Ry. Survey, containing 75 acres, more or less, recorded Jan. 4th, A. D. 1918, Book 36, page 587.

And we also hereby bargain, sell and convey unto the Continental Royalty Co. an undivided half interest in and to all royalties to which we may be entitled under that certain lease heretofore made by us upon the said land above described to —— —— lessee, and dated the — day of —— and of record in Vol. — page — Deed Record of Titus County, Texas, together with an undivided half of all rights thereunder.

It is hereby mutually agreed between the parties hereto that the price above shown, to be paid for the above described mineral rights and royalties shall be paid in the stock of The Continental Royalty Company, at its par value; and further, that of the stock so paid, 40% of same will be assigned by First Parties to Amer-

ican Royalty Company of all expenses of every kind of the Continental Royalty Company.

It is further agreed that the above sale of mineral rights is conditioned on a good and merchantable title to said property; abstract of which brought down to date shall be furnished by First Parties, and further, this contract shall not become binding on Second Party until approved by its Board of Directors, and accepted by the Board of Appraisers of The Continental Royalty Company, which approval and acceptance must be made not later than ten days after receipt of abstract of title as above mentioned, or this contract becomes null and void.

It is agreed that notice of such approval or acceptance shall be given to said First Party either by registered mail or in person.

The First Party hereby agrees to pay off and discharge any and all encumbrance now or hereafter existing on said property above described promptly upon maturity, including taxes and assessments of all kinds, and should First Party fail or refuse to do so, it is agreed that the said, The Continental Royalty Company may do so, and shall thereupon become fully subrogated to all rights of owners or holders of any such encumbrance, taxes or assessments.

It is understood that this contract is executed in duplicate either or both of which shall be deemed and held to be original for all purposes.

Witness our hands this 30th day of March, 1921.

G. A. McPeters.
Lillie McPeters."

This instrument is copied from the Findings of Fact of the trial court.

Plaintiffs R. M. Vaughn and his wife, Millie Lou Vaughn, contended that the said instrument was ineffectual to convey any title to the lands involved in this suit, for the reason that the description was wholly insufficient.

With further reference to such description, the trial court made the following Finding of Fact:

> "In writing the description in the said instrument executed and delivered by McPeters and wife to the defendant on March 30th, 1921, a mutual mistake was made in that it was intended by such instrument to make reference to the correct book and page of the Deed Records of Titus County, in which there was recorded on November 16, 1917, the deed to the 101 acre tract by which the said George Lilienstern conveyed to the said G. A. McPeters the said 194 acre tract which includes the 101 acre tract described in plaintiff's petition, and instead of describing such record as Book 36, page 436, as it would have been if correctly described, it describes the same as Book 36, page 434. Notwithstanding such mistake, I find that the parties to such instrument, by the execution and delivery thereof, then mutually understood and agreed and intended, and did in fact thereby convey unto the defendant, Continental Royalty Company, a corporation, an undivided one-half interest in and to all mineral rights in and under the tract of land described in plaintiff's petition."

He further concluded, as a matter of law, that the conveyance above set out did convey to the defendants the undivided mineral interest, and thereby the defendants became vested with that mineral interest.

Whether or not the above conveyance was sufficient to convey the mineral interest purported to have been conveyed thereby is the sole question for determination.

Defendant, Continental Royalty Company, did not ask for any reformation of the deed, nor did they ask for a correction of the deed by mutual mistake, and there was no question presented to the Court for a correction of the deed, but the deed was relied upon as a conveyance within itself.

R. M. Vaughn and his wife, Millie Lou Vaughn, appealed this case to the United States Circuit Court of Appeals for

the Fifth Circuit for review, and the majority opinion of the Court, written by Judge Hutcheson, affirmed the judgment of the Trial Court, and upon the question of the description, stated as follows:

> "The first question presented: was the description in the deed from McPeters to defendant sufficient to identify and convey the land in suit? We think it was. Where as here, there is not a patent but merely a latent ambiguity in a description which when applied, is shown to be plainly a clerical or other unimportant error, and it appears from the facts that the parties knew what land was intended to be conveyed and acted on that knowledge, the courts of Texas have sustained assertions of title under such deeds by rejecting that part of the description which is false and sustaining the part of it which is true."

Citing in support of that holding:

14 Tex. Jur. Deeds, Secs. 201, 203-4-5-6-7-12 and 14;
*Myers* v. *Maverick,* 27 S. W., 1083;
*Easterling* v. *Simmons,* 293 S. W., 693;
*Coffey* v. *Hendrick,* 66 Tex., 676;
*Caddell* v. *Lufkin Land & Lumber Co.,* 255 S. W., 397;
*Douthit* v. *Robinson,* 55 Tex., 69;
*Corham* v. *Settegast,* 98 S. W., 673;
*Noland* v. *Weems,* 141 S. W., 1934;
*Ludtke* v. *Mackey,* 261 S. W., 140.

From the majority opinion Judge Sibley dissented, and he held that the description was void, and the deed was ineffectual to convey any title. A copy of the majority opinion, and a copy of the dissenting opinion is attached hereto and made a part of this petition.

**Reasons Relied Upon for the Allowance of the Writ.**

Under Rule 38 of the Rules of the Supreme Court, a review on writ of certiorari may be granted where a Circuit

Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

We submit that the question of the sufficiency of the description in the deed involved in the present case is a very important question of local law because it affects conveyances of real estate in Texas, and the decision of the Circuit Court of Appeals is in direct conflict with all of the applicable local decisions.

**Argument.**

The dissenting opinion by Judge Sibley in the present case is in conformity with the Texas decisions on this question and follows the most recent case in point decided by the Texas Supreme Court, *Smith* v. *Sorelle* (1935), 126 Tex. 353, 87 S. W. (2d) 703, which holds that a deed containing the same vice as the one in the present case is void for want of sufficient description.

It is a well settled rule of law in this state that a deed must furnish the means of enabling an inquirer to determine with reasonable certainty what land was intended to be conveyed, and where a deed fails to convey this information it is void as a conveyance. There are no Texas cases to the contrary. The recent case of *Smith* v. *Sorelle* (*supra*) is exactly in point; in an opinion written by Judge Sharp the Supreme Court of Texas clearly restated the law applicable to the present case. In that case the deed under consideration contained the following description:

> "A certain tract of land situated, lying and being in the County of Upshur, State of Texas, described as follows: 100 acres out of Blocks 8 and 9 of the Subdivision of Jose Maria Pineda Survey, which was patented to Adolphur Stern, Patent 608, Vol. 2, three above described lands being now under an oil and gas miles North of Gladewater, Texas. * * * and said

> lease originally executed in favor of W. M. Worley and now being held by W. M. Worley."

In holding that the above quoted description was insufficient and void and that it could not be aided by parol evidence the Supreme Court of Texas said:

> "The rule is well settled that parol evidence cannot be introduced to vary or contradict the descriptive data of a deed. The descriptive words in an instrument should be given a liberal construction, in order that the writing may be upheld, and parol evidence is admitted to explain the descriptive words and to identify the land; but the instrument itself must contain a nucleus of description. The parol testimony must directly be connected with the descriptive data, and when more than this is required, the description is insufficient."

An analysis of *Smith* v. *Sorelle* (*supra*) shows that it involved the identical question which was presented to the Circuit Court of Appeals in the present case and that the holding of the Texas Supreme Court in that case was directly opposite to the holding of the Circuit Court of Appeals in the present case. In *Smith* v. *Sorelle* (*supra*) the land was described as 100 acres out of Blocks 8 and 9 of the Subdivision of the Pineda Survey and as being the same land covered by an oil and gas lease executed in favor of W. M. Worley. Obviously the only means of identifying this land was by reference to the lease in favor of W. M. Worley, and the Texas Supreme Court held that a lease in favor of *H. F.* Worley could not be referred to for the purpose of identifying the land and validating the conveyance. Since no lease in favor of *W. M.* Worley was offered in evidence, it was held that the deed conveyed no land.

In the present case, the land was described as "containing 101 acres, more or less, recorded November 16, A. D. 1917, Book 36, page 434." Clearly this deed cannot be said

to convey anything unless reference to Book 36, page 434 can be used to identify the land intended to be conveyed. As shown by the undisputed evidence and by the findings of fact made by the trial court in the present case, the land in controversy was not described by the instrument appearing in Book 36, at page 434. Just as in *Smith* v. *Sorelle* (*supra*) it was held that only a lease in favor of *W. M.* Worley could be used to identify the land conveyed, so in the present case the correct holding under the Texas law in the present case would have been that only the instrument appearing in Book 36, page 434 could be referred to in aid of the description under which the Continental Royalty Company claims.

Yet the majority opinion by the Circuit Court of Appeals in the present case says:

> "When it appears from the facts that the parties knew what land was intended to be conveyed, and acted on that knowledge, the courts of Texas have sustained such assertions of title under such deeds by rejecting that part of the description which is false and sustaining the part of it which is true."

We respectfully submit that there is no Texas decision which holds that the deed here under consideration can be aided by parol evidence and can be validated because the parties knew what land was intended to be conveyed. On the contrary, the rule of law established by Texas courts is well stated in the case of *Buie* v. *Miller* (Er. Ref.) 216 S. W. 630, in the following language:

> "It is well settled that nothing passes by deed except what is described in it, whatever the intention of the parties may have been."

Another decision in point is *Coker* v. *Roberts*, 71 Tex. 665, where the Texas Supreme Court said:

> "The rule is that a deed, to be valid, must describe the land by its terms, or give data from which the de-

scription may be found and made certain. There is nothing referred to in the deed that could help the description and in such case parol evidence is not admissible to show what land was intended to be conveyed. The deed is void upon its fact for want of certainty in description. Norris *v.* Hunt, 51 Tex., 612, and authorities there cited; Cleveland *v.* Sims, 69 Tex., 154; Bitner *v.* Land Co., 67 Tex., 342; Terrell *v.* Martin, 64 Tex., 125. It is true that this deed was between private parties, in which every presumption should be indulged that some interest should pass; *but when a deed between individuals is utterly devoid of any matter of identity whatever, and is devoid of any reference from which the specific land intended to be conveyed can be identified, it must be held to be void.*" (Italics ours.)

The reason for the rule which renders such instruments void is that a deed which does not contain a description of the land is insufficient to meet the requirements of the Statute of Frauds. As stated by the Texas Supreme Court in *Smith* v. *Sorelle* (*supra*).

"The law provides that no action can be maintained on a contract for the conveyance of real estate unless the contract, or some memorandum thereof, be in writing. Article 3995, R. S. 1925. If the subject-matter sought to be conveyed is not described sufficiently to identify same, the requirements of the statute have not been met. Oil and gas in place under land are regarded as real estate, and conveyances thereof are subject to the same rules governing the conveyance of real estate.

"In the case of Norris *v.* Hunt, 51 Tex. 609, in discussing the sufficiency of the description of land contained in an instrument in order to be valid, the court said:

'It is said by Chief Justice Marshall, in Chinoweth *v.* Haskell, 3 Pet. (92), 96 (7 L. Ed. 614), that "It is an obvious principle that a grant must describe the land to be conveyed, and that the subject granted must be

identified by the description given of it in the instrument itself."

'Both for the reasons for which the statute of frauds was enacted and upon the authority of adjudged cases, this rule should apply as well to other instruments for the conveyance of lands, as to grants technically so known.

'The true rule, as deduced from the authorities, seems to be that this description should be so definite and certain upon the face of the instrument itself, or by other writing referred to, that the land can be identified with reasonable certainty.

'To hold otherwise would defeat the wise intention and object of the statute, by permitting the rest in parol extrinsic testimony, that which should have been embraced in the written instrument.'

"The foregoing rule has long been established in this state, and has been repeatedly followed in many cases. Collier et al. *v.* Valley Building & Loan Ass'n., et al. (Tex. Com. App.), 62 S. W. (2d), 82; Cleveland *v.* Sims, 69 Tex., 153; 154; 6 S. W., 634; Bitner *v.* Land Company, 67 Tex., 341; 342; 3 S. W., 301; Terrell *v.* Martin, 64 Tex., 121, 125; Coker *v.* Roberts, 71 Tex. 597; 9 S. W., 665; Higgins *v.* Bankers' Mortgage Co. (Tex. Com. App.), 13 S. W. (2d), 683; Continental Supply Co. *v.* M., K. & T. Ry. Co. of Texas et al. (Tex. Com. App.), 268 S. W., 444, 445; Id. (Tex. Com. App.), 269 S. W. 1040; Smith *v.* Crosby, 86 Tex., 15; 23 S. W., 10; 40 Am. St. Rep., 818; see Fagg *v.* Texas Company (Tex. Com. App.); 57 S. W. (2d), 87; 14 Texas Jurisprudence #200, pp. 986, 987, and authorities cited; Hammond *v.* Wells, 45 Mich., 11; 7 N. W. 218."

Under the above authorities, it is clear that the description in the contract under which Continental Royalty Company claims title is not sufficient to describe the land in controversy and contains no data which would assist in describing said land. The Continental Company relied solely upon the language of this instrument and did not seek to reform

the instrument in this suit. We submit that the dissenting opinion by Judge Sibley follows the established rule of law in this State and that the majority opinion by Judge Hutcheson is in direct conflict with the Texas decisions in point.

> "While the application is grounded upon Rule 38 of the Supreme Court, which gives jurisdiction in a case where the decision of the Circuit Court is in conflict on an important question of local law; as indicated by Judge Sibley's dissenting opinion in the case, the majority opinion as written by Judge Hutcheson is also in conflict with basic principles of law recognized and announced by courts of last resort in every English speaking jurisdiction. It is even in conflict with this Court as reflected in Chinoweth *v.* Haskell, 3 Pet. (92), 96 (7 L. Ed., 614), quoted page 10 of this application. The opinion being in the language of Chief Justice Marshall.
>
> "Not only that, but Rule 38 of this court is apparently grounded upon the decision of this court in the somewhat recent cases of Erie Ry. Co. *v.* Tompkins, 304 U. S., 64 (82:1188) and West *v.* American Tele. & Tele. Company, Six Companies of California *v.* Joint Highway District No. 13 and Fidelity Union Trust Company *v.* Field, all decided on December 9, 1940, and Stoner *v.* N. Y. Life Ins. Co., decided December 23, 1940."
>
> "The decision of the Circuit Court of Appeals being contrary to the local decisions of the court of last resort in Texas, such decision is in conflict with the rules announced in the above captioned cases, which give effect to the principles announced in the rule under consideration."

WHEREFORE, your petitioner respectfully prays that Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a transfer of the record of the proceedings herein, and that

the decree of the United States Circuit Court of Appeals for the Fifth Circuit be reviewed by this Honorable Court, and your Petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

BEN D. CLOWER,
FRANK BEZONI,
*Attorneys for Petitioners.*

(3698)

(27)

MAY 12 1941
CHARLES ELMORE CROPLEY
CLERK

# SUPREME COURT OF THE UNITED STATES

**October Term, 1940**

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**No. 942**

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R. M. VAUGHN AND WIFE,
MILLIE LOU VAUGHN, *Petitioners*,

v.

CONTINENTAL ROYALTY COMPANY.

---

## REPLY BRIEF
## to
## PETITION FOR WRIT OF CERTIORARI

---

STOREY, SANDERS, SHERRILL
& ARMSTRONG,
ROBERT GERALD STOREY,
*Counsel for Respondent,*
*Continental Royalty Company.*

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# SUPREME COURT OF THE UNITED STATES

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## REPLY BRIEF
## to
## PETITION FOR WRIT OF CERTIORARI

---

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

### Concurrent Findings of Fact by District Court and Circuit Court

The following are Findings of Fact made concurrently by the United States District Court and by the Circuit Court of Appeals, which Respondent deems vital in any disposition of this cause, and which the Re-

spondent submits, under the rules and construction thereof, can be accepted as final by this Honorable Court.

(1) The parties to the deed complained of knew what land was intended to be conveyed and acted on that knowledge. (Opinion—Circuit Court of Appeals, paragraph No. 1, at page 73.—116 Federal (2d) 72.)

(2) The Petitioners bought under deed, and seek to deraign title solely under that deed, as against this Respondent, which deed to the Petitioners contained as a portion of its description the same alleged defective reference on which they rely exclusively for relief as against this Respondent, to wit, reference to deed recorded in "Volume 36, page 434," Deed Records of Titus County, Texas (Transcript of Record, page 81), and which is the same reference as made in deed to this Respondent, and which is attacked by the Petitioners. (Petition for Writ of Certiorari, page 2.)—(Paragraph No. 3, page 74, 116 Federal (2d).)

(3) "* * * the consideration for the 101 acre tract was *fully paid to and accepted by McPeters," the Respondent's vendor, and the party under whom Petitioners claim* and on whose remedy, if any, the Petitioners must rely. (Paragraphs 4 and 5, page 74, Opinion.)

(4) The instant suit was filed July 3, 1936 (Transcript of Record, page 5), after Respondent had been holding since March 30, 1921, by deed regular on its face, and executed, acknowledged and delivered by Pe-

titioners' predecessors (first paragraph, Opinion, page 73, 116 Federal (2d), which deed had been duly filed for record on the 5th day of April, 1921, and recorded on the 13th day of May, 1921, in the Deed Records of Titus County, Texas, in Volume 50, page 27 (Transcript of Record, page 36); and the vendee, Continental Royalty Company, Respondent herein, has been claiming under same since that date.

**Argument**

The case of *Smith v. Sorelle*, cited and relied upon by Petitioners, is distinguishable from the instant case on three material points.

FIRST, the contract attacked in that case was dated February 5, 1931, and the complaining party, seeking to set aside deed dated February 11, 1931, supposed to have been executed in pursuance of such contract, promptly and diligently attacked both the contract and the deed by suit filed on May 13, 1931; whereas in the instant case, no complaint was made for more than fifteen years after the execution of the deed and the filing and recording of same.

SECOND, there was allegation and evidence in the Sorelle case that the consideration agreed upon had never been paid, and that the deed was in the hands of the Defendant "without consideration and * * * in violation of the terms of contract * * *"; whereas in the instant case, the conclusive findings of fact show

consideration wholly paid by the Respondent to its vendors, and no attack directly or indirectly ever made upon that basis, the evidence showing that the original vendors accepted the consideration and retained it without ever offering to return, or complaining in any manner.

THIRD, in the case cited by Petitioners, the descriptive reference attacked was not aided by the doctrine of *idem sonans*, the reference being to deed by a person, neither of whose initials was correct, and therefore the doctrine of *idem sonans* was not available; whereas in the instant case, the sole technicality complained of, in the face of both of the lower Courts' conclusive findings, was as to a two page mistake or oversight as to reference, there being no question that the deed, referred to for aid, was actually present in the volume of the Deed Records referred to, and only two pages removed from the page named.

Respondent respectfully suggests that the cited case of *Smith v. Sorelle* by Petitioner can not be fully understood without reading the Opinion in the same case in the Court of Civil Appeals in cause entitled *Busby et al v. Smith et al*, 53 S. W. (2d) 138.

Petitioners make quotation on page 11 of their Petition without showing the source thereof, though at first glance it might appear to be a quotation from Judge Silbley's dissenting opinion. Accordingly, since such quotation is not from Judge Sibley's dissenting opin-

ion, and the source thereof is not disclosed, Respondent does not answer.

The Petitioners seek Writ under Rule 38 of this Honorable Court upon allegation that the Circuit Court of Appeals has decided an important question of law in a way probably in conflict with applicable local decisions.

In view of the above quoted concurrent findings of the District Court and the Circuit Court of Appeals and their finality herein, no conflicts exist when examined in the light of the facts in the cases relied upon by Petitioner.

The Respondent can not amplify, in view of the foregoing, on the Opinion and the cases cited by Judge Hutcheson in the majority opinion in the instant case, to which reference is hereby made. To cite from the cases would be surplusage at this time. Suffice it to say that Respondent insists that they fully support the decisions on the various points as reached by Judge Hutcheson.

In passing, however, Respondent would call this Honorable Court's attention to the fact that under the statutory action of Trespass to Try Title in Texas, the Petitioner can never recover upon infirmity of his adversary's title, but only upon Petitioners' proved superior title. *Salinas v. Jones*, 60 Federal (2d) 1049; *Hillman v. Meyer*, 35 Texas 461; *Kirby Lumber Company v. Conn*, 263 S. W. 902.

In the instant case, the same alleged defect appears in the title to Petitioners that appears in the deed to Respondent in that the deed to Petitioners contains the same description, in part, by reference to "Volume 36, page 434," that is contained in the deed herein complained of.

We also direct the Honorable Court's attention to the fact that Texas has four primary adverse possession statutes pertaining to the titles to land, to wit: three years (Article 5507, Revised Civil Statutes of Texas, 1925, as amended); five years (Article 5509, Revised Civil Statutes of Texas, 1925, as amended); ten years (Article 5510, Revised Civil Statutes of Texas, 1925, as amended); and twenty-five years (Article 5519, Revised Civil Statutes of Texas, 1925, as amended).

The Respondent stresses the particularly obvious fact herein, which is that the Petitioners' position is entirely technical, in that no question has been raised as to any fraud, or any defect in execution, acknowledgment and delivery. The consideration between the Petitioners' predecessors and the Respondent was openly and fairly arrived at and paid to and accepted by the vendors, who themselves never made any complaint. The suit herein is an attempt by alleged technicality to deprive the Respondent of its property for which it paid a fair consideration, and in a transaction with which all parties thereto were apparently satisfied, and

of which no complaint was made for more than fifteen years.

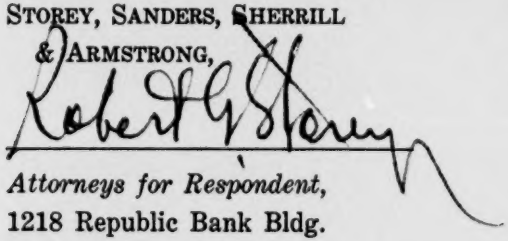
There has been no miscarriage of justice in this case.

## Conclusion

Respondent respectfully suggests that upon an analysis of the facts found, the decisions cited by Judge Hutcheson and the distinctions evident from an analysis of facts present in the instant case as contra-distinguished from those in the Petitioners' cases, the ground for jurisdiction of this Honorable Court, relied upon by Petitioners, does not exist, and that the Petition for Writ of Certorari should be dismissed.

Respectfully submitted,

STOREY, SANDERS, SHERRILL & ARMSTRONG,



*Attorneys for Respondent,*
1218 Republic Bank Bldg.
Dallas, Texas.